

NO. 94293-5

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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PUGET SOUNDKEEPER ALLIANCE,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; and  
STATE OF WASHINGTON, POLLUTION CONTROL  
HEARINGS BOARD,

Respondents.

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**STATE OF WASHINGTON'S ANSWER TO  
AMENDED SUPPLEMENTAL BRIEF OF AMICUS CURIAE  
SQUAXIN ISLAND TRIBE**

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## **I. INTRODUCTION**

In issuing National Pollutant Discharge Elimination System permits, the State strictly adheres to the PCB limit imposed by federal and state law. WAC 173-201A-240(5); 40 C.F.R. § 131.36 (2013). In addition, as required by RCW 90.48.520, the discharge permits require permittees to incorporate business practices and treatment techniques designed to reach the PCB limit.

Despite this, the Squaxin Island Tribe contends that the Department of Ecology is violating state and federal law by requiring permittees to use Method 608, rather than Method 1668C, for monitoring tests. They are wrong. In issuing permits, Ecology must require that permit holders use the monitoring method approved in 40 C.F.R. part 136, or a superseding, published method. WAC 173-201A-260(3)(h). 40 C.F.R. part 136 requires Method 608. As scientific advances are made, the EPA regularly amends its rules by publishing superseding test methods. Although the EPA has considered adopting Method 1668C, it has repeatedly determined that it is not yet ready for use. *E.g.*, 82 Fed. Reg. 40836 (Aug. 28, 2017). As experts for both Ecology and Soundkeeper testified before the Pollution Control Hearings Board, there are significant problems that need to be resolved before Method 1668C will be able to

produce accurate results. Until that happens, Ecology is complying with state and federal law by requiring permittees to use Method 608.

## **II. ARGUMENT**

### **A. There Is No Statutory or Regulatory Requirement that the Monitoring Methods Reach the PCB Limit**

At the time Seattle Iron's discharge permit was issued, federal and state regulations imposed a water quality standard of 0.00017 µg/L for PCBs. 33 U.S.C. § 1311(a); WAC 173-201A-240(5); 40 C.F.R. § 131.36 (2013). While the Tribe makes broad references to federal and state law, it does not cite any statutory language requiring the PCB limit to match the detection limit of the monitoring test. This is because neither federal nor state law require that the monitoring method be sensitive enough to reach the PCB limit.

The EPA's recent actions illustrate that it is unwilling to hinder efforts to reduce PCB pollution until there is a more sensitive way to monitor wastewater. In 2016, the agency lowered the PCB limit to 0.000007 µg/L. 81 Fed. Reg. 85417, 85430 (Nov. 28, 2016). After lowering the PCB limit, the EPA reiterated that the approved monitoring test is Method 608, which has a minimum detection limit of 0.25 µ/L and a practical quantitation limit of 0.05 µ/L, considerably higher than the PCB limit. 82 Fed. Reg. 40836 (Aug. 28, 2017). In so doing, the EPA

specifically noted that Method 1668C is not approved as a monitoring test. *Id.* at 40876, 40914.

If the EPA had approved Method 1668C, it would not address the gap between the performance of the monitoring method and the current PCB limit of .000007 µ/L. Even when the flaws in the method are resolved, Method 1668C will be incapable of detecting all but a small fraction of PCBs at the level of the current PCB cap. AR 2751; 2819-29 (Table 2).<sup>1</sup>

Ecology is hopeful that a monitoring test will be developed that can accurately detect PCBs at the same level as the limit. Until then, lowering the PCB limit before an equally stringent monitoring method is developed does not render the Clean Water Act meaningless, as the Tribe suggests. Amicus Br. at 8. With the lower PCB limit, Ecology is able to require permittees to use more stringent prevention and treatment processes. AR 3254, 3269-80.<sup>2</sup> This is a primary component of the discharge permit—Seattle Iron’s prevention and treatment plan is a forty-page, detailed plan for compliance with the PCB cap. AR 1331-70. If

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<sup>1</sup> Citations are to the Administrative Record (AR) before the Pollution Control Hearings Board and to the Clerk’s Papers (CP) submitted to this Court.

<sup>2</sup> Citation is to the Permit under appeal at the Pollution Control Hearings Board, prior to the modifications ordered by the Board. CP at 60.

Seattle Iron were only required to meet the limits of the monitoring test, the pollution treatment plan would not be as rigorous.

**B. Method 1668C Is Not a Published, Superseding Test Method Under WAC 173-201A-260(3)(h)**

Ecology's rules require that discharges be monitored using the method approved by the federal government. WAC 173-201A-260(3)(h) provides:

The analytical testing methods for these numeric criteria must be in accordance with the "*Guidelines Establishing Test Procedures for the Analysis of Pollutants*" (40 C.F.R. Part 136) or superseding methods published. [Ecology] may also approve other methods following consultation with adjacent states and with the approval of the [EPA].

The Tribe contends that Ecology's reading of the rule gives the same meaning to each of these options, rendering one of the options duplicative.<sup>3</sup> Amicus Br. at 7. Not so. The rule indicates that the analytical method must be in accordance with 40 C.F.R. part 136. The rule also recognizes that the EPA responds to scientific advances by publishing superseding methods. For example, as recently as August 2017, the EPA published an updated version of Method 608. 40 C.F.R. pt. 136, app. A; 82 Fed. Reg. 40836 (Aug. 28, 2017). The revised method supersedes the prior version of Method 608.

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<sup>3</sup> As the Court of Appeals noted, the parties agree that Method 1668C is a published method. *Puget Soundkeeper All. v. Dep't of Ecology*, No. 48267-3, 2017 WL 72504 (Wash. Ct. App. Feb 22, 2017) (unpublished). That is not in dispute here.



In adopting a superseding analysis for Method 608, the EPA specifically rejected Method 1668C. The agency stated: “Method 1668C may be useful for determination of PCBs as individual chlorinated biphenyl congeners” but “[a]t the time of writing of this revision, Methods 1668C and 1699 had not been approved for use at 40 CFR part 136.” 82 Fed. Reg. at 40876, 40914. The EPA’s practice of approving updated methods comports with the dictionary definition of “superseding” by making the prior test methodology “obsolete, inferior, or outmoded.” *Webster’s Third New International Dictionary* 2295 (2002).

While the Tribe contests Ecology’s reading of WAC 173-201A-260(3)(h), it does not offer an alternative meaning for the phrase “superseding methods published.” Instead, the Tribe argues that Ecology’s reading tears a hole in the structure of the Clean Water Act. Amicus Br. at 8. They misunderstand the structure of the federal law. In reality, federal law limits pollutants, but allows release of contaminated wastewater pursuant to a National Pollutant Discharge Elimination System permit. 33 U.S.C. § 1342. Ecology is administering the federal permit program in accordance with the law. Until a superseding monitoring method is approved by the EPA, Ecology does not have authority to replace the monitoring method approved in the federal regulation with the test favored by the Tribe and Soundkeeper.

**C. The Shortcomings of Method 1668C Are Properly Before the Court**

Instead of addressing the serious shortcomings of Method 1668C, the Tribe urges the Court to ignore the testimony in the record calling the method into question, the EPA's concerns with the method, and the comments in the EPA's published rulemaking file. Amicus Br. at 10-13. The Tribe contends that arguments about the shortcomings of Method 1668C exceed the scope of the issue on appeal and were raised for the first time in briefing to this Court. They are wrong on both counts.

First, the validity of Method 1668C is directly at issue because Soundkeeper asked this Court to determine whether Method 1668C can be used for compliance monitoring. Pet. at 1, issue 1. Soundkeeper's Petition argues that the Pollution Control Hearings Board erred in upholding use of Method 608, because, according to Soundkeeper, Method 1668C is "the most recently developed and most sensitive method available" and allows "more precise" analysis.<sup>4</sup> Pet. at 9. But, as shown in the State's supplemental brief, Soundkeeper is incorrect.

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<sup>4</sup> The Tribe also suggests that, should Soundkeeper prevail in this matter, that the issue will remand to Ecology and the Pollution Control Hearings Board "for evidence and argument about what tests are available, what tests should be required, and how they should be used." Amicus Br. at 12. But this is not the relief Soundkeeper seeks. Soundkeeper instead asks this Court to step into Ecology's shoes as a regulator and either deny permit issuance altogether or condition permit issuance on the EPA's approval of the use of Method 1668C.

Second, the problems with Method 1668C were not raised for the first time on appeal. Throughout this litigation, Ecology has responded to Soundkeeper's request for Method 1668C by presenting evidence that it is not yet ready for use in compliance monitoring. At the Pollution Control Hearings Board, Ecology's Northwest Regional Office Supervisor for Industrial Permit Writing testified that the sampling procedures for Method 1668C are not reliable. RP 650:17-654:16. He explained that Ecology has experienced problems with PCB background contamination levels in empty sample containers. RP 650:17-654:16. When even empty containers reflect contamination, Ecology cannot determine whether a failed Method 1668C test indicates that Seattle Iron is responsible for the PCBs, or whether the test is picking up the omnipresent PCBs in the air, water, and soil along the lower Duwamish. Similarly, Soundkeeper's expert also testified before the Board that background contamination is a problem. RP 79:10-15. Soundkeeper's expert explained the necessity of developing sampling protocols and methods to deal with the problem of false positives. RP 79:20-80:3. Consistent with this testimony, Spokane County's amicus brief properly discusses the County's experiences with these failings of Method 1668C.

In addition to considering the testimony taken by the Board, it is appropriate for the Court to look to the EPA and federal regulations to

determine whether Method 1668C is a reasonable means of ensuring compliance. *See* RCW 90.48.520. In 2010, the EPA considered approving Method 1668C for use in discharge permits. 75 Fed. Reg. 58024 (Sept. 23, 2010). The comments the EPA received from government agencies, individuals, and industry organizations explain why Method 1668C was not adopted. For example, the Los Alamos National Laboratory commented that it is working with the New Mexico Environment Department to study background contamination, and expressed that they are concerned that laboratories are using inconsistent analytical methods to address the background contamination.<sup>5</sup> Los Alamos asked that the EPA address a list of concerns regarding the Method and shortcomings in the EPA’s study report. Similarly, the Department of Defense supported the EPA’s work with Method 1668C, but identified corrections that need to be made to the analytical method before Method 1668C can be used.<sup>6</sup> Other government agencies and private laboratories, including the National Association of Clean Water Agencies, also expressed “significant concerns with [Method 1668C] performance, including issues relating to

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<sup>5</sup> <https://www.regulations.gov/document?D=EPA-HQ-OW-2010-0192-0150> (Dec. 20, 2010) (last visited Sept. 25, 2017).

<sup>6</sup> <https://www.regulations.gov/document?D=EPA-HQ-OW-2010-0192-0237> (Feb. 1, 2012) (last visited Sept. 25, 2017).

contamination . . . .”<sup>7</sup> Based on the comments to the proposed rule, and the inconsistencies that arose in the EPA’s own laboratory study of the method, the EPA concluded that Method 1668C is not yet ready as a compliance monitoring method. 77 Fed. Reg. 29758 (May 18, 2012); 82 Fed. Reg. 40836 (Aug. 28, 2017).

Given the problems with Method 1668C, it is understandable that the Tribe needs the Court to turn a blind eye to testimony in the record, the comments received by the EPA, and the EPA’s repeated conclusion that Method 1668C is not yet ready for use. Viewed in full, the record demonstrates that there is no support for Soundkeeper and the Tribe’s suggestion that all permits must be denied unless Method 1668C is used as the compliance monitoring test.

**D. Washington May Only Issue Discharge Permits that Comply with EPA Rules**

Ecology does not have authority to issue a permit that does not comply with the federal law or to allow discharge of contaminated waste without a permit. In issuing National Pollutant Discharge Elimination System permits, Ecology is administering a federal program under the Clean Water Act. 33 U.S.C. § 1311(a); RCW 90.48.260(1)(a).

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<sup>7</sup> <https://www.regulations.gov/document?D=EPA-HQ-OW-2010-0192-0182> (Dec. 22, 2010) (last visited Sept. 25, 2017).

Despite this, the Tribe accuses Ecology of threatening to “allow unfettered and unmonitored pollution” if it cannot require the use of Method 1668C in Seattle Iron’s permit. Amicus Br. at 9. What Ecology’s brief actually states is that it is not a workable solution to simply deny all permits until the EPA develops a monitoring test that accurately detects PCBs at the human health limit. State’s Suppl. Br. at 17-18.

Stormwater cannot be locked up indefinitely because it is vital to treat and release it into Washington’s waterways. When land is undeveloped, rainwater is absorbed and naturally filtered by soil and plants. It slowly replenishes groundwater tables, and feeds streams and estuaries. Development stops that natural process. The stormwater picks up pollutants and then rushes into waterways, without going through the natural filtration process.<sup>8</sup> Discharge permits address this problem by requiring a massive volume of stormwater to be captured and treated before it is returned to the State’s waterways. For example, in Seattle, just *one acre* of pavement generates 1 million gallons of stormwater annually.<sup>9</sup> If stormwater is not returned to the waterways, the water table and instream water flows will plummet, devastating drinking water supplies, fish, and agriculture.

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<sup>8</sup> <http://www.kingcounty.gov/services/environment/water-and-land/stormwater/introduction/stormwater-runoff.aspx> (last visited Sept. 25, 2017).

<sup>9</sup> <https://fortress.wa.gov/ecy/publications/documents/0710058.pdf>.

In the case of Seattle Iron, for example, even closure of their recycling operations will not stop the wastewater problem. Every time it rains, the stormwater picks up PCB contamination from every surface it hits at Seattle Iron's facility, including the ground and the rooftops. Seattle Iron's permit requires it to capture all of that contaminated rainwater. Similarly, state and local governments must capture all of the stormwater contaminated by PCBs on public roadways and parking lots. Tribal and municipal wastewater treatment plants also must contend with a constant influx of PCB contaminated wastewater and stormwater.<sup>10</sup>

Discharge permits are a critical tool for controlling this endless accumulation of contaminated water. They address the PCB issue in three ways: (1) by limiting the PCBs allowable in discharged water, (2) by requiring monitoring, and (3) by requiring extensive equipment and management practices to reduce and treat PCB contaminated water. Violation of any permit requirement is grounds for government enforcement action. 40 C.F.R. § 122.41(a). In addition, the Clean Water Act allows citizens to bring an action to enforce all of a permit's provisions. *See Nat'l Res. Def. Council, Inc. v. County of Los Angeles*, 725 F.3d 1194, 1204 (9th Cir. 2013). Hopefully, scientific advances will result

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<sup>10</sup> See <https://yosemite.epa.gov/r10/water.nsf/NPDES+Permits/CurrentOR&WA821> (last visited Sept. 25, 2017) (listing tribal and federal entities in Washington and Oregon that hold discharge permits).

in the EPA approving a more sensitive monitoring test in the near future.  
Until then, the other aspects of the permit program play a vital role in  
reducing PCBs in Washington's waterways.

### III. CONCLUSION

The Board decision should be upheld. Until the problems inherent  
in Method 1668C have been resolved, and the method is adopted by the  
EPA, federal and state law do not allow it to be the monitoring method  
required in discharge permits.

RESPECTFULLY SUBMITTED this 29th day of September,  
2017.

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I certify under penalty of under the laws of the State of Washington that I served a copy of the State of Washington's Answer to Amicus Brief, via electronic mail, upon the following:

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